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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

No. 724

UNITED STATES OF AMERICA ex rel.,
ANTHONY VOLPE,
Petitioner,

vs.

S. D. SMITH, District Director of Immigration,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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S. D. SMITH, District Director of Immigration,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Anthony Volpe for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, respectfully shows:

Your petitioner respectfully seeks a review of a decision of the Circuit Court of Appeals affirming a judgment of the District Court dismissing the petition of your petitioner for a writ of habeas corpus and remanding petitioner to the custody of S. D. Smith, United States District Director of Immigration, for deportation (R. 155).

The petition for habeas corpus was directed against a warrant of the Assistant to the Secretary of Labor (R. 138-139) ordering deportation of your petitioner to Italy

on two charges, under Section 19 of the Immigration Act of February 5, 1917, 39 Stat. 889, 8 U. S. Code 155 (quoted as a footnote). These charges were as follows:

> **First.* That petitioner has been convicted of felony or other crime or misdemeanor involving moral turpitude prior to his entry (re-entry) into the United States, to-wit, violations of Sections 148, 150, 219 and 37 of the Criminal Code of the United States (18 U. S. C. 262, 264, 348 and 88), in possessing, making, and counterfeiting postage stamps and war savings stamps, possessing plates therefor, and conspiracy to commit said offenses.
>
> *Second.* That he entered (re-entered) the United States by means of false and misleading statements, thereby entering without inspection.

The District Court held in its written opinion (R. 147-154) that petitioner was deportable on the charge of entry by false and misleading statements, thereby entering without inspection, and that he was not deportable on the charge of conviction of a crime involving moral turpitude prior to his entry into the United States. The Court of Appeals rendered two opinions, namely, a unanimous opinion on June 21, 1932 (R. 169-179) holding that petitioner was not deportable on either of said two charges, and upon rehearing an opinion of June 11, 1933 (R. 180-196) in which the majority of the court (R. 180-186) held that petitioner was deportable on both charges and a dissenting opinion (R. 186-196) to the effect that he was deportable on neither of said charges.

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* At any time within five years after entry * * * any alien who, after February 5, 1917, is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; * * * any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; at any time within three years after entry, any alien * * * who enters without inspection, shall upon the warrant of the Secretary of Labor, be taken into custody and deported."

A.

SUMMARY STATEMENT OF MATTERS INVOLVED.

First. Has the Court of Appeals jurisdiction to review on appeal of petitioner from that portion of a judgment of the District Court unfavorable to petitioner and favorable to respondent, another portion of the judgment favorable to petitioner and unfavorable to respondent, no appeal having been taken by either party and no assignments of error having been filed by either party to said last mentioned portion of the judgment,—said judgment granting to respondent the full relief claimed by it in the litigation?

Second. Is an alien deportable under title 8, Section 155, U. S. Code, as "an alien who was convicted * * * prior to entry, of a felony or other crime or misdemeanor involving moral turpitude" because of a conviction in the United States for counterfeiting postage and war savings stamps and conspiracy so to do, which conviction occurred nineteen years after his first entry and about three years before his re-entry?

Third. Are the crimes of counterfeiting postage stamps and war savings stamps and conspiracy so to do, or either of them, crimes of moral turpitude?

Fourth. Is an alien deportable under title 8, Section 155, U. S. Code, as an alien "who enters without inspection" when after nineteen years' residence in the United States he visits Cuba for two or three days and on re-entry to the United States states correctly to the examining inspector his name, residence address in the United States, age, birthplace, marital status, number of children, length of residence in the United States, etc., but who states falsely that he is a naturalized citizen of the United States?

Fifth. Is alienage sufficiently proven in a deportation proceeding by the statement of the presiding inspector that "the United States naturalization file shows that one Anthony Volpe, petitioner No. 30179, was admitted to citizenship March 27, 1920, by Judge David, and on the following Saturday, April 3, 1920, the order admitting Anthony Volpe to citizenship was set aside and the certificate issued to him cancelled?" (R. 22).

Sixth. Is there any evidence to sustain a charge of entry by false and misleading statements thereby entering without inspection, in proof which consists of the incredible testimony of one immigration inspector that, after the passage of two and one-half years during which time he examined 20,000 to 30,000 other entrants, he remembers that the alien stated when entering that he was a naturalized citizen of the United States, which testimony is contradicted by the testimony of the alien and several accompanying persons that he stated to the inspector that he had first papers for naturalization?

Seventh. Is a hearing fair in which the prosecution shows many immaterial and prejudicial matters such as numerous arrests of the alien without successful prosecution thereafter, the acquaintance of the alien with persons afterwards convicted of income tax violations, his supposed connection with "gangs and gangsters", and in which the prosecution refuses to produce the alien manifest made at the time of the alien's re-entry in question, and refuses to produce for cross-examination a witness whose hearsay statements were relied on by the prosecution as to the origin of the citizen's manifest containing petitioner's name at time of re-entry?

B.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

First. The majority opinion has decided an important question of general law in a way probably untenable in holding that it had jurisdiction to review the District Court's holding that conviction of crime in the United States prior to re-entry was not a cause for deportation,—because by the District Court's judgment respondent obtained all the relief it sought and could not and did not appeal from this unfavorable portion of the judgment.

National Fire Insurance Co. v. *Elliott*, 7 F. (2) 522, 527 (8th Cir.).

Millward v. *Vulcan Furnace & Equipment Co.*, 26 F. (2d) 78 (3d Cir.).

Harding v. *Federal National Bank*, 31 F. (2) 914, 919 (1st Cir.).

O'Neil v. *Wolcott Min. Co.*, 174 Fed. 527 (10th Cir.).

Building and Loan Assn. v. *Logan*, 66 Fed. 827 (5th Cir.).

Second. The holding in this case by the Circuit Court of Appeals (majority opinion) that an alien is deportable for conviction in the United States of a crime committed in the United States about nineteen years after original entry and about three years before re-entry, is in conflict with the decisions of four other Circuit Courts of Appeals, namely:

Consiglio v. *Day*, 55 F. (2d) 228 (2d Cir.);
Squillari v. *Day*, 35 F. (2d) 284 (3d Cir.);
Browne v. *Zurbrick*, 45 F. (2d) 931 (6th Cir.);
Wilson v. *Carr*, 41 F. (2d) 704 (9th Cir.); and
Wong You v. *Weedin*, 33 F. (2d) 377 (9th Cir.).

Third. The majority opinion herein has decided an important question of federal law in a way probably untenable in holding that counterfeiting postage stamps and war savings stamps and conspiracy so to do, are crimes of moral turpitude.

Bartos v. *United States District Court,* 19 F. (2d) 722, 725 (8th Cir.).

Coykendall v. *Skrmetta,* 22 F. (2) 120 (5th Cir.).

Andreacchi v. *Curran,* 38 F. (2) 498 (D. C., N. Y.).

Fourth. The question whether an alien who, when reentering, makes numerous true answers and one false answer in reply to numerous questions of the immigration inspector, thereby enters without inspection, is the subject of conflicting decisions by the Courts of Appeals. The majority opinion in the Court of Appeals in this case and the decision of the Court of Appeals (9th Cir.) in *Ex p.* Saadi, 26 F. (2d) 458, hold that such entry is entry without inspection. The Court of Appeals (8th Cir.) in *Ex p.* Southro, 8 F. (2d) 1023, and several District Courts have held that such entry is not entry without inspection, viz., *Ex p.* Lalime, 244 F. 279 (D. C., Mass.); *Ex p.* Guest, 287 F. 884 (D. C., R. I.); and *Ex p.* Gouthro, 296 F. 506 (D. C., Mich.). *Iorio* v. *Day,* 34 F. (2d) 920 (2d Cir.) logically is an authority in agreement with those last cited.

Fifth. The holding of the Circuit Court of Appeals herein that alienage was sufficiently proven by a mere statement of an immigration inspector that a record of the Naturalization Office showed cancellation of Volpe's decree of naturalization, is a decision on a question of general law in a way probably untenable. *Bilokumski* v. *Tod,* 263 U. S. 149, 44 S. C. 54, 68 L. Ed. 221; *Brader* v. *Zurbrick,* 38 F. (2d) 472 (6th Cir.); *Riley* v. *Howes,* 24 F. (2d) 686 (2d Cir.).

Sixth. The Circuit Court of Appeals herein has decided an important question of general law in a way probably untenable and in conflict with the weight of authority in holding sufficient to prove false statement the incredible testimony of Inspector Phillips that he remembered for almost three years after inspection of tens of thousands of entrants in the meanwhile, the details of his examination of Volpe, notwithstanding the contradiction of such testimony by several witnesses. *Quock Ting* v. *United States,* 140 U. S. 417, 11 S. C. 733, 35 L. Ed. 501; *Arkwright* v. *Gonser,* 59 F. (2d) 702, 706 (9th Cir.); *Allen* v. *Collins,* 52 F. (2d) 708 (8th Cir.); *Larabee Flour Mills* v. *Carignano,* 49 F. (2d) 151 (10th Cir.).

Seventh. The Circuit Court of Appeals herein has decided an important question of general law in a way probably untenable in deciding in substantial effect that the deportation hearing was not unfair, notwithstanding the production of immaterial and prejudicial testimony by the prosecution, such as numerous unjustified arrests of petitioner, his acquaintance with persons afterwards convicted of income tax violations, and his supposed connection with gangs and gangsters, and the refusal by the prosecution to produce a material witness whose hearsay statements were introduced against defendant, and the refusal by the prosecution to produce the alien manifest whose contents were described orally by Inspector Phillips in an attempt to corroborate his testimony. *Kwock Jan Fat* v. *White,* 253 U. S. 454, 40 S. C. 566; *Mason* v. *Tillinghast,* 27 F. (2d) 580 (1st Cir.); *Gonzales* v. *Zurbrick,* 45 F. (2d) 934 (6th Cir.); *Whitfield* v. *Hanges,* 222 F. 745 (8th Cir.); *Ungar* v. *Seaman,* 4 F. (2d) 80 (8th Cir.).

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Seventh Circuit, direct-

ing said court to certify and send to this court a full and complete transcript of the record and of the proceedings in said Circuit Court of Appeals had in Case No. 4607 entitled *United States ex rel. Anthony Volpe* v. *S. D. Smith, District Director of Immigration*, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein be reversed by this court, and for such further relief as to this court may seem proper.

ANTHONY VOLPE,
By FRANK R. REID,
His Attorney.

JOHN ELLIOTT BYRNE,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of courts below.

The first opinion of the Circuit Court of Appeals (that of June 21, 1932, not yet reported) appears in the record in full at pages 169-179; the second opinion (that of January 11, 1933, not yet reported) appears in full in the record at pages 180-186 for the majority opinion and pages 186-196 for the dissenting opinion. The opinion of the District Court appears in the record at pages 147-154.

II.

Jurisdiction.

The jurisdiction of the Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, Section 347, title 28 U. S. C.

III.

Statement of the case.

Petitioner Volpe was born in the Argentine about forty-two years ago (R. 21) and taken by his parents in early life to Italy from whence in 1906 at the age of sixteen years he was brought by them to the United States (R. 25) where he has ever since resided, marrying an American wife

with whom he lives with their three American children aged thirteen to fifteen (R. 16). He has supported himself and his family by working at places and for firms set forth in detail by him (R. 43).

Volpe was naturalized as a citizen of the United States on March 27, 1920, by Judge David of one of the State Courts of Illinois. A few days later a naturalization examiner told Volpe he would cause him to be prosecuted for perjury unless he agreed to cancellation of the certificate (R. 22-23). The only proof of cancellation was the statement of the presiding inspector at the deportation hearing that the naturalization files showed cancellation (R. 22-23).

In 1925 Volpe was indicted with others for making, possessing and passing counterfeit stamps and conspiracy so to do. Volpe pleaded not guilty. After a lengthy trial the jury disagreed (R. 129). As Volpe's limited means had been exhausted by the first trial, he agreed to plead guilty and take a sentence of thirty days in jail, which sentence was imposed and duly served by him (R. 83).

In June, 1928, he went to Cuba with a party of friends on a sightseeing visit, returning in two or three days by airplane, landing at Key West, Florida, a regularly designated port of entry under the immigration laws and regulations.

In December, 1930, a warrant of the Bureau of Immigration was served charging him with being unlawfully in the United States in that before his entry (re-entry) at Key West, he had been convicted of a crime of moral turpitude by the counterfeiting charges above mentioned. During the hearing the additional charge was made orally that his entry at Key West was by false and misleading statements and thereby without inspection (R. 27).

There were two sets of deportation hearings in this case

and two warrants ordering deportation, viz., one set of hearings, and a warrant before habeas corpus proceedings were instituted and one set and a second warrant after such institution and while said proceedings were pending (R. 7, 87, 138). The purpose of the government in ordering the second set of hearings was to present the testimony of Inspector Phillips as to petitioner's alleged false statements when re-entering. The government relies on the entire evidence at both sets of hearings and on the second warrant of deportation (R. 138).

At the deportation hearing it was testified by Inspector Phillips, who examined this party at Key West, that Volpe was asked a number of questions and among other things stated that he was a naturalized citizen of the United States and that his papers were in Chicago and he was thereupon admitted (R. 90-91). The testimony of Inspector Phillips was contradicted by that of four witnesses, all of whom testified that Volpe advised all inquirers in 1928 that he had only "first papers for naturalization" and that his previous certificate of naturalization as he understood, had been cancelled, Volpe (R. 27, 55, Prignano (R. 33), Serritella (R. 36), Pacelli (R. 37). Volpe is an uneducated man with no knowledge of law, and his statement that the certificate was cancelled has no probative force to show legal cancellation.

At the deportation hearing Volpe was denied opportunity to explain the reasons which led him to plead guilty to an indictment containing charges of which he maintains he is innocent (R. 40-43). The immigation officials, however, brought into the record many irrelevant and prejudicial matters, viz., as to whether Volpe knew Al Capone, the so-called gang leader, as to whether he was a member of his so-called gang (R. 30), that one of the members of the party visiting Cuba was Jacob Guzik, who was convicted

several years later of income tax evasion (R. 30), that Volpe was several times arrested but never convicted (R. 59), that he was in January, 1931, arrested on a vagrancy warrant issued by Judge Lyle of the Municipal Court of Chicago (R. 59), which case later was dismissed for want of prosecution.

Appellant's counsel requested the Bureau of Immigration to produce two inspectors for examination (R. 123-124). These inspectors had had custody of the documents relied on by the government and one of them was Phillips' superior and had given him instructions about the subject-matter. This request was refused by the presiding inspector (R. 127, 128).

Appellant's counsel requested the government to produce Mr. Morgan, whose testimony would have been very important because of the frequent use of his name by Inspector Phillips. The latter said in substance that Mr. Morgan delivered to Phillips the citizen manifest Government Exhibit H, and also said that the Volpe party was connected with Al Capone and that Morgan was present when the Volpe party arrived at Key West and that Morgan was a "representative" of the airplane company (R. 103, 109-110).

IV.

Specifications of error.

First. The Court of Appeals erred in assuming jurisdiction to review the District Court's holding that conviction of crime in the United States before re-entry, is not under the law, cause for deportation.

Second. The Court of Appeals erred in holding that an alien is deportable because of conviction in the United States for counterfeiting postage and war savings stamps and conspiracy so to do, such conviction occurring nineteen

years after his first entry and about three years before his re-entry.

Third. The Court of Appeals erred in holding that counterfeiting postage stamps and war savings stamps, and conspiracy so to do, are crimes of moral turpitude.

Fourth. The Court of Appeals erred in holding that an alien is deportable as one who enters without inspection because of the making of a false statement on re-entry from temporary absence in Cuba that he is a naturalized citizen of the United States in the course of an examination by the inspector during which the alien answers truthfully numerous other questions of the inspector.

Fifth. The Court of Appeals erred in holding that alienage is sufficiently proven by hearsay statement of the presiding inspector at the deportation hearing, that "the United States naturalization file shows that one Anthony Volpe, petitioner, 30179, was admitted to citizenship March 27, 1920, by Judge David and on the following Saturday, April 3, 1920, the order admitting Anthony Volpe to citizenship was set aside and the certificate issued to him cancelled."

Sixth. The Court of Appeals erred in holding that the false statement was sufficiently proved by the incredible testimony of Inspector Phillips, that after three years time and the examination of tens of thousands of other entrants he remembered the details of his examination of Volpe and that Volpe stated he was a naturalized citizen, which testimony was contradicted by the testimony of Volpe and three other witnesses.

Seventh. The Court of Appeals erred in holding in substantial effect that the hearing was fair, notwithstanding the production of irrelevant and prejudicial matter against petitioner and the refusal of the prosecution to produce material witnesses and material documents under its control.

V.

ARGUMENT.

(1) Error in the decision that petitioner was deportable for conviction in the United States of crime before re-entry.

(a) This question was not properly before the court of appeals for decision.

The respondent did not take any appeal with respect to the unfavorable portion of the order of the District Court on this point. Respondent filed no assignment of error and did nothing to bring the District Court decision on this proposition to the Court of Appeals for review. Indeed, it is doubtful that anything could be done to procure review. The District Court judgment gave the respondent everything it asked for, viz., the right to deport petitioner. In the case of *National Fire Insurance Co.* v. *Elliott*, 7 Fed. (2d) 522 (8th Cir.), a similar attempt was made by the defendant in error. The court said, at page 527:

> "This court is without jurisdiction to consider that question on the assignment of the defendant. Cross-errors are not assignable in the Federal Courts. *Guarantee Co.* v. *Phenix Ins. Co.*, 124 Fed. 170."

In *Millward* v. *Vulcan Furnace & Equipment Co.*, 26 Fed. (2d) 78 (3d Cir.), the court ordered certain expenses paid by complainant to defendant as a condition precedent to specific performance by the latter. The defendant appealed and the complainant did not appeal. The court said, at page 78:

> "The complainant, evidently satisfied with the decree in its favor on the main issue, did not appeal, but by a procedure quite unknown to this court—which it terms 'cross assignment of error'—charges error to the court in allowing the larger sum and making specific performance conditioned on its payment. Of course the complainant cannot in this manner hold fast to the decree for what is favorable to it and obtain a review without cost or risk."

In *Harding* v. *Federal National Bank*, 31 Fed. (2d) 914, 919 (1st Cir.), the court said:

> "It appears that the decree appealed from was in his favor and granted him all the relief he sought. His cross appeal was therefore improperly taken. *Corning* v. *Troy Iron & Nail Factory*, 56 U. S. (15 How.) 451, 464, 465, 14 L. Ed. 768; *Guarantee Co.* v. *Phenix Ins. Co.*, 124 Fed. 170, 173. And such being the case, it was not open to him to assign or urge cross-errors. *Rogers* v. *Penobscot Mining Co.*, 154 Fed. 606, 609."

Other cases hold that an appellee who takes no appeal cannot by assigning cross-errors or by argument in briefs, confer on the Court of Appeals' jurisdiction to review rulings against him in the court below. *O'Neil* v. *Wolcott Mining Co.*, 174 Fed. 527 (10th Cir.); *Building and Loan Association* v. *Logan*, 66 Fed. 827 (5th Cir.).

(b) The question was rightly decided by the District Court.

However, if the question be open for review on behalf of the Government on this record, it seems clear that Judge Wilkerson's decision on this proposition was correct. The majority opinion herein erroneously, we submit, cites the following cases as upholding the power of deportation for conviction of crime in the United States prior to entry, namely: *United States ex rel. Medich* v. *Burmaster*, 24 Fed. (2d) 57 (8th Cir.); *Bendel* v. *Nagle*, 17 Fed. (2d) 719

(9th Cir.); *Weedin* v. *Yamada*, 4 Fed. (2d) 455 (9th Cir.); *Gomes* v. *Tillinghast*, 37 Fed. (2d) 935 (D. C., Mass.).

In *Medich* v. *Burmaster*, 24 Fed. (2d) 57 (*supra*), this point was not discussed and evidently was not considered by the court.

Bendel v. *Nagle*, 17 Fed. (2d) 719 (*supra*), was expressly disapproved by the same court in the subsequent case of *Wilson* v. *Carr*, 41 Fed. (2d) 704.

In *Weedin* v. *Yamada*, 4 Fed. (2d) 455 (*supra*), the point here under consideration was not raised by counsel nor considered by the court. This fact is noted by the same court of appeals in the case of *Wilson* v. *Carr*, 41 Fed. (2d) 704, at page 706.

In *Gomes* v. *Tillinghast*, 37 Fed. (2d) 935 (Judge Morton, D. C., Mass.), evidently the point under consideration here was not raised, as Judge Morton enumerates the points raised, in which this was not included. In the course of discussion of another point, Judge Morton remarked, by way of obiter, "I am unable to see why they (a crime and conviction) should have less effect because they occurred here."

Thus it is apparent that there is now outstanding no decision by any court of appeals favoring the Government's position on this proposition other than of course the majority opinion in the present case.

On the other hand, the cases supporting Judge Wilkerson's decision and the petitioner's position are clear-cut and authoritative. The Court of Appeals of the Ninth Circuit which has had this proposition under consideration in several cases, has finally and definitely decided that deportation cannot be had because of the commission of a crime in the United States before entry or re-entry. See

Wilson v. *Carr*, 41 Fed. (2d) 704; *Wong Yow* v. *Weedin*, 33 Fed. (2d) 377.

The Court of Appeals of the Sixth Circuit has arrived at the same conclusion in an exhaustive and logical opinion in *Brown* v. *Zurbrick*, 45 Fed. (2d) 931.

In *U. S. ex rel. Linklater* v. *Commissioner of Im.*, 36 Fed. (2d) 239, Judge Woolsey, in a well considered opinion, denied the power to deport because of the commission of a crime prior to re-entry.

The majority opinion overlooks two decisions sustaining our position on this proposition. These cases are *Squillari* v. *Day*, 35 Fed. (2d) 284 (3d Cir.), and *Consiglio* v. *Day*, 55 Fed. (2d) 228 (2d Cir.). It thus appears that the Courts of Appeals of the Second, Third, Sixth and Ninth Circuits have ruled that deportation may not be had for crime committed in the United States before re-entry, and that no Court of Appeals now finally holds adversely other than the majority in the present case.

The authorities and reasons supporting our contention are cogently summarized by the Court of Appeals, Sixth Circuit, thus:

> "At the time of this conviction, Browne had been a resident of the United States for eight years, and the conviction was therefore three years beyond the limit within which the statute fixes deportation as a result. It is also evident, though perhaps not important, that, if the conviction had been within the five years, the court which allowed probation would also certainly have recommended against, and thereby barred, deportation. 8 U. S. C. A., Sec. 155. We have then a case where, although Congress in one clause has declared that a particular conviction did not justify deportation, it has, in another clause—if the Government's contention be correct—ordered deportation because of the same conviction. It is true that there has been an intervening departure and re-entry, and that the alien's

rights and burdens, for most purposes, attend and depend upon the second entry (*Lewis* v. *Frick*, 233 U. S. 291, 34 S. Ct. 488, 58 L. Ed. 967); but that concession does not reach the point. The reasonable construction of these two clauses, so that each may have its appropriate force, is that the deportation which automatically follows a conviction is the prospective consequence of a crime and conviction in this country, while the deportation which follows conviction or admission of a crime committed before entry refers to a conviction (if not also to a crime) occurring outside of this country. The statute has been in this particular several times before the Circuit Court of Appeals of the Ninth Circuit. In *Weedin* v. *Yamada*, 4 F. (2d) 455, there had been a conviction in this country prior to the second entry. It was considered sufficient to support the deportation, but the question now before us was not raised or considered. In *Bendel* v. *Nagle* (C. C. A.) 17 F. (2d) 719, 57 A. L. R. 1129, there had been a previous conviction, and the holding, though the discussion is summary, is clear that it was immaterial whether the conviction had been in this country or abroad. In *Wong Yow* v. *Weedin*, (C. C. A.) 33 F. (2d) 377, the crime during the former residence here was admitted. In a careful discussion, this was thought not sufficient to justify deportation, and because the crime had not been committed abroad. The case does not mention *Bendel* v. *Nagle*, nor suggest any distinction. What is said would seem to apply to a conviction as well as to an admission, and to indicate that the vital distinction is between crimes in this country and crimes abroad. In *Keizo-Shibata* v. *Carr*, (C. C. A.) 35 F. (2d) 636, the case involved an admission, not a conviction, and the court affirmed and applied the Wong Yow case, but pointed out and stressed the distinction between an admission and a conviction—thus seemingly approving *Bendel* v. *Nagle*, although not mentioning that case. We are compelled to think that upon this point there is no sound distinction between an admission and a conviction, and that the view of the statute taken by that court in the Wong Yow and the Keizo-Shibata cases necessarily leads to the view that the conviction prior to the second entry, which will bar

that entry, must have been abroad and not in the United States.

In *Linklater* v. *Commissioner*, (D. C. N. Y.) 36 F. (2d) 239, the subject is considered in a careful opinion by Judge Woolsey, and, although the crime was there shown by admission, yet the discussion applies as well to a conviction; and we find ourselves in accord with that view of the construction of the statute."

Brown v. *Zurbrick*, 45 F. (2d) 933, 934 (6th Cir.).

Likewise in *Wilson* v. *Carr*, 41 F. (2d) 706, 707 (9th Cir.), the court said:

"On the facts here presented, the appellant could not be deported for a crime committed in 1908, had he remained here, because of the lapse of time, and the commission of that offense would be no obstacle to his naturalization, because he would only be required to establish his good moral character for a period of five years prior to the date of his application. In other words, the law in its charity has condoned the offense for all practical purposes, and it seems shocking that an alien should be deported for a crime committed in this country, at any time during his natural life, simply because years later he crossed the international boundary line for some temporary purpose. We do not think that Congress so intended. The order of the court below is reversed."

Wilson v. *Carr*, 41 F. (2d) 706, 707, (9th Cir.).

In *Consiglio* v. *Day*, 55 F. (2d) 228, in a per curiam opinion, the Court of Appeals, Second Circuit, said at page 229:

"It becomes unnecessary for us to examine the evidence and say whether or not on July 4, 1920, the alien was in Canada. We are of the opinion that he may not be deported under sections 136, 155, U. S. Code Anno. title 8, as 'any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude,' for the reason that the crime was committed in the United States. *United States ex rel. Squillari* v. *Day*, 35 F. (2d) 284 (C. C. A. 3); *Ex parte Keizo*

Shibata, 35 F. (2d) 636 (C. C. A. 9); *Wilson* v. *Carr*, 41 F. (2d) 704 (C. C. A. 9); *Browne* v. *Zurbrick*, 45 F. (2d) 931 (C. C. A. 6). It thus appears that the Third, Sixth and Ninth circuits have construed section 19 of the act (8 U. S. C. A., sec. 155) as referring to a crime committed prior to entry, and must be one committed outside this country and not within the penal jurisdiction of the federal or state authorities, to warrant deportation. We are in accord with these views."

The argument of the majority herein that the words "felony", "misdemeanor" and "moral turpitude" are familiar in American courts, seems to amount to little more than to say that the statute is expressed in the American or English language, as of course are all our statutes. The basic flaw in the reasoning of the majority opinion on this point is that it seeks to make a different distinction between crimes committed before as compared with those committed after entry than the distinction made by Congress.

(c) The conviction of Volpe was not of crimes of moral turpitude.

The majority opinion assumes without discussion or citation of authorities, that the offenses here involved are crimes of moral turpitude. If the finding on this point was properly before the Court of Appeals we respectfully submit that conspiracy to counterfeit stamps is not a crime of moral turpitude because it is not inherently base, vile or depraved.

> "Moral turpitude is defined to be an act of baseness, vileness or depravity, in the private or social duties which a man owes to his fellow men or to society in general.
>
> "Moral turpitude implies something immoral in itself regardless of the fact whether it is punished by

law. The doing of the act itself, and not its prohibition by statute, fixes the moral turpitude."

Bartos v. *United States District Court*, 19 F. (2d) 722, 725 (8th Cir.).

Coykendall v. *Skrmetta*, 22 F. (2d) 120 (5th Cir.).

These cases hold that violation of the National Prohibition Act is not a crime of moral turpitude.

Likewise, we submit that none of the other counts charge an offense of moral turpitude. The offenses charged all have to do with counterfeiting War Savings stamps and postage stamps. There is no charge of counterfeiting money. War Savings stamps and postage stamps are designed merely to facilitate the revenue raising work of the government and violation of a revenue act is not of moral turpitude.

Thus, violation of the Narcotic Act is not of moral turpitude because the statute is merely of a revenue character.

Andreacchi v. *Curran*, 38 F. (2d) 498 (D. C., N. Y.).

(2) The majority opinion as to the false statement construction of the statute seems erroneous.

In the consideration of this case, it should be remembered throughout **that Volpe was absolutely entitled of right to enter the United States on the occasion in question.** He had an established lawful domicile of twenty-two years in the United States to which he was returning after a temporary absence of two or three days in Cuba. He was not required to present a passport, visa or permit to re-enter.

Rule 3, Sub. 1, Par. 2 of Im. Rules of Mar. 1, 1927.

He was not required to pay a head tax.

Rule 1, Sub. k, Par. 1, Im. Rules of March 1, 1927.

The Court of Appeals, 2nd Circuit, in *North German Lloyd* v. *Elting*, 48 F. (2d) 547, 548, said:

> "If the alien was, as he claimed to be, returning to a United States domicile, he was not in an excluded class, but was absolutely entitled to enter."

Some decisions hold that aliens returning from a temporary visit to Cuba, Canada, etc., need not be inspected at all. *In re Wysback*, 292 F. 761 (D. C., Mass.) and dissenting opinion in *Natali* v. *Day*, 45 F. (2) 112 (2d Cir.).

Even the courts which hold that inspection is required on return from a temporary visit to Cuba, Canada, etc., definitely indicate that **the inspection shall merely go to identification of the person and establishment of domicile and temporary visit.**

Even Inspector Phillips, after some evasion, admitted that in such case (R. 111):

> "If I am positively satisfied that person is what he claims to be, he will be admitted."

Unquestionably he was entitled to return and remain because of his true status. In other words, he was not within the excluded classes. All the decisions (except the Saadi case) hold that such a person cannot be deported for a misstatement in connection with inspection in entering.

In *Ex parte Lalime*, 244 Fed. 279 (D. C., Mass.), the court said:

> "No decision has been called to my attention holding that a misstatement to an immigration inspector made by a person not within the excluded classes, is ground for deportation after the alien has been admitted into this country. There is no express provision to that effect in the statute and I do not think the statute can properly be extended by implication to cover such extremely wide powers."

In *Ex parte Guest,* 287 Fed. 884 (D. C., R. I.), the same rule was announced in the following words:

> "That persons who have not made a false oath but who have given misinformation upon inspection, are to be classified as persons who enter without inspection, is hardly a satisfactory interpretation of the law as a whole."

In the present case, assuming for the purpose of argument that Volpe did make a misstatement, he was not under oath and therefore did not swear falsely.

The court continues:

> "If full inquiry of the Immigration Inspector was evaded, yet it does not appear that any detriment followed from the admission of the applicant into the country, if, in fact, he was not a contract laborer. Upon this question there now seems to have been full inquiry and an absence of any evidence which is inconsistent with the right of the applicant to remain in the country."

In *Ex parte Guthro,* 296 Fed. 506 (D. C. Mich.), the same principles are followed and the construction of entry without inspection by false statements is again rejected. The court says:

> "The third and last ground for the deportation of the petitioner, as stated in the warrant, is the finding that she entered by means of false and misleading statements, thereby entering without inspection. * * *
>
> The real complaint of the Government in this connection is that petitioner made false and misleading statements to the inspector. *While, however, that might have been and perhaps should be made a ground for the exclusion of aliens, Congress has not seen fit to so enact.* I reach the conclusion that, whether or not petitioner made false and misleading statements to the inspector as alleged, the contention of the Government that petitioner entered without inspection is without legal basis and cannot be sustained." (Italics ours.)

The Court of Appeals, Sixth Circuit, in a *per curiam* opinion affirmed the Guthro decision (8 Fed. (2d) 1023), saying:

> "The controlling facts and the legal principles upon which the District Court based its conclusion fully appear in the opinion of that court in *Ex parte Guthro*, 296 Fed. 506. After a careful consideration of the record, briefs, and arguments of counsel, this court concurs in the conclusion reached by the District Court, for the reasons stated in its opinion and fully sustained by the authorities therein cited. It is therefore wholly unnecessary to burden the reports with a restatement of facts, or a further discussion of the principles of law involved."

The Court of Appeals, Second Circuit, has held in *Iorio* v. *Day*, 34 Fed. (2d) 920 (July, 1929), that entry by means of a false statement is not entry without inspection.

In that case Iorio, an Italian, after living a number of years in the United States, returned to Italy for nine months and then re-entered the United States. A warrant was issued by the Bureau of Immigration charging that "he had entered by means of false statements and without inspection" (and was on his entry likely to become a public charge). At the hearing on these charges, there was evidence that before leaving the United States he had at least six times been convicted of violations of liquor laws and imprisoned at least once therefor, and that after his return he had been regularly engaged in the illicit sale of liquors.

In procuring the visa on which his re-entry was made, he swore falsely that he had never been imprisoned. The charges were held to be sustained by the Secretary of Labor. However, the Court of Appeals said, at page 921:

> "Strictly the first ground of deportation as it reads is bad in law. The statute does not make it a ground

> for deportation that the alien has made a false oath upon his application for a visa or used it to get in. *It is wrong to say in such a case that he came in without inspection* or in violation of law. It is true that the relator was bound to tell the truth upon his application, but if what he suppressed was irrelevant to his admission, the mere suppression would not debar him. Doubtless it might be made to do so, but we cannot find that it has been. So the first question comes down at most to whether the facts, had he disclosed them, would have been enough to justify the refusal of a visa or exclusion upon entry." (Italics ours.)

The court then discusses the facts and decides that the offenses involved did not justify deportation or exclusion; therefore that the false statement was not (even assuming the statute included false statements under the words without inspection) material and that the charge was invalid.

The majority opinion cites *Natali* v. *Day*, 45 F. (2) 112 (2d Cir.), as sustaining the false statement construction of the statute. This seems erroneous as there was no false statement and no inspection whatever involved in that case. See Judge Alschuler's dissenting opinion (R. 191).

The one case which holds that entry by false statement is entry without inspection is that of *Ex parte Saadi*, 26 Fed. (2d) 458. In the Saadi case, Saadi was given no inspection whatever when entering, while in the instant case Volpe was given a lengthy examination and inspection when entering.

The theory of the Saadi decision and that of the Immigration Bureau in that of the present case are essentially different. In the Saadi case the lack of inspection was fundamental and the false statement incidental or descriptive of the cause resulting in lack of inspection. In the present case, the theory of the Immigration Bureau has been that the alleged false statement was jurisdictional and

invalidated the actual lengthy inspection. In the Saadi case the court says, at page 459:

> "The act provides for the deportation of any one 'who enters without inspection;' and the charge was distinctly made that the appellant entered without inspection. *That charge is not minimized or modified by the further specification that he entered by means of false and misleading statements.*" (Italics ours.)

As Volpe was entitled to enter regardless of citizenship, the attempt to deport him is based on the veriest technicalities. Undue importance is attributed to the alleged misrepresentation as to citizenship. The question of his citizenship under the circumstances was of no more practical importance than would have been the question of his religion. If the alleged misrepresentation had been made, it would have been ethically culpable, but it would have resulted in not the slightest harm and would not be punishable by the terrible retribution of deportation and life-long exile.

As noted by Judge Alschuler herein (R. 195):

> "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion. *Church of the Holy Trinity* v. *U. S.*, 143 U. S. 457; *Henderson* v. *Mayor of New York*, 92 U. S. 259; *U. S.* v. *Kirby*, 7 Wall. 482; *Oates* v. *National Bank*, 100 U. S. 239."
>
> *Lau Ow Bew* v. *U. S.*, 144 U. S. 47, 59.

That Congress did not intend the words "without inspection" as synonymous with "by means of false and misleading statements," is established by the history of this clause. The false statement construction of the statute was consistently repudiated by the Federal Courts in all the reported decisions on the point which appellant's counsel have been able to find, for a period of more than ten years. During that time five District Courts (viz., *Lewis*

v. *Frick*, 189 F. 146; *U. S.* v. *Martin*, 193 F. 795; *Ex parte Lalime*, 244 Fed. 279; *Ex parte Guest*, 287 F. 884 and *Ex parte Guthro*, 296 Fed. 506), and one Court of Appeals (*Ex parte Guthro*, 8 F. (2) 1023), decided adversely to the Government's present contention. During the same period Congress enacted no less than twenty-four separate statutes relating to aliens and immigration. Yet in not one of these laws did Congress indicate that the judicial construction of this clause was not correct.

Even more significant is the fact that in the early part of 1929 an effort was made to have Congress enact a law to provide that the making of false statements, by an alien in connection with inspection should constitute ground for deportation. Congress refused to pass the bill containing the provision mentioned.

This event occurred in the 70th Congress, Second Session, in which House Bill No. S-5094, as reported to the House of Representatives, contained (among others), the following provisions:

> "That the following aliens shall, upon warrant of the Secretary of Labor, be taken into custody and deported in the manner provided in sections 19 and 20 of the Immigration Act of 1917, if the Secretary of Labor, after hearing, finds that such aliens are undesirable residents of the United States: * * *
>
> (5) An alien who hereafter enters the United States at any time or place other than as designated by immigration officials, or eludes examination or inspection by immigration officials, or obtains entry to the United States by a wilfully false or misleading representation or the wilful concealment of a material fact."

The quoted provisions were entirely stricken from the bill as finally enacted March 4, 1929 (8 U. S. C. 180a).

In an effort to support the "false statement" construction the majority opinion suggests that entry in connection

with a false statement is analogous to entry by coercing the inspector with a revolver (R. 186). Judge Alschuler pertinently remarks on this point (R. 195):

> "Of course, if the alien 'guns' himself in, as suppositiously stated in the opinion, a situation would be presented so very different from that here as to require no consideration."

The Supreme Court expresses a similar thought in *Sorrells* v. *U. S.* (Dec. 19, 1932), 53 S. C. 210, 216, in these words:

> "We have no occasion to consider hypothetical cases of crimes so heinous or revolting that the applicable law would admit of no exceptions."

This court has clearly distinguished between fraud and coercion in *Fasulo* v. *U. S.*, 272 U. S. 620, 628, 47 S. C. 200, 201, thus:

> "Undoubtedly the obtaining of money by threats to injure or kill is more reprehensible than cheat, trick or false pretenses: * * * But broad as are the words 'to defraud' they do not include threat and coercion through fear or force."

(3) The prosecution did not sustain the burden of proof to establish alienage of the petitioner.

An order of deportation must be predicated on a finding of alienage. The burden of proof is on the government when alienage is asserted.

Bilokumsky v. *Tod*, 263 U. S. 149, 44 S. Ct. 54, 68 L. Ed. 221.

Brader v. *Zurbrick*, 38 Fed. (2d) 472 (6th Cir.).

Riley v. *Howes*, 24 Fed. (2d) 686 (1st Cir.).

In the present case, the proof, such as it is, is uncontroverted that appellant received a final judgment of naturalization in the Circuit (or Superior) Court of Cook County,

Illinois, in March, 1920 (R. 22, 46). These are courts of competent jurisdiction in naturalization cases (Act June 29, 1906, C-3592; Sec. 357, Title 8 U. S. Code Ann.).

To overcome the effect of this proof, the prosecution several times suggested cancellation of the naturalization judgment (R. 22). However, no attempt was made by the prosecution to produce the records or copies thereof in the naturalization case. From such proof as there is in the record, however, it appears that the order of cancellation, if one there was, was entered in violation of the Federal statute providing for cancellation by equity proceedings with 60 days' notice to defendant (Act June 29, 1906, C-3592, Sec. 15, Title 8, Sec. 405, U. S. Code).

In the present case, as the prosecution suggested that the certificate of naturalization was cancelled on April 3, 1920, one week after it was issued, the statute, it is plain, was not followed with respect to the 60-day notice. Neither is there anything in the present record to indicate that any petition for cancellation was ever filed by the authorities, or any issue made thereupon or any hearing thereon.

Instead of producing the records of the naturalization court or authentic copies thereof, the presiding inspector at the hearing made the following statement (R. 22):

> "Inspector: The United States Naturalization file shows that one Antonio Volpe, petitioner #30179, was admitted to citizenship March 27, 1920, by Judge David, and on the following Saturday, April 3, 1920, the order admitting Antonio Volpe to citizenship was set aside and the certificate issued to him cancelled."

In an attempt to cure the strange absence from the hearing of the records of the naturalization court, the immigration inspector made repeated efforts to induce the appellant to state that his certificate of naturalization was "cancelled" and that appellant was a "citizen of Italy." Appel-

lant, although an intelligent person of gentlemanly deportment, is deficient in education and knows nothing of law, so that his statements as to legal questions of "cancellation" of a court judgment and as to his citizenship, based on a complicated situation involving questions of law and fact, are of no effect.

In *Engel* v. *Zurbrick*, 51 Fed. (2d) 632 (6th Cir.), the date of entry being in issue and the alien having made conflicting statements and stated he went to work for the Ford Company within a few weeks after his arrival. The court says, at page 633:

> "The record contains a statement by the examining inspector that the records of the Ford Company showed that this man began work in June, 1923; and the conclusion of the inspector and the Department that he entered in 1923, and had been here less than three years, is confessedly based mainly on this supposed record of the Ford Company. No such record was put in evidence, nor did the aliens have any chance to cross-examine or explain. Their original evidence as to date of entry, satisfied the statutory burden of proof, *and, in treating the Ford record as sufficient to overcome their evidence, it is too plain for controversy that, in this respect, they did not have a fair trial, and that the warrants of deportation would have to be vacated for that reason, if no other.*" (Italics ours.)

In the present case the presiding inspector's statement was hearsay and was evidently his conclusion as to the purport of a letter or letters written by some unknown person, which letter or letters were again hearsay and conclusions of the unknown writer as to court proceedings and which letter or letters were stated by the inspector, as his conclusion to be a "United States Naturalization file" of some unnamed office. Where the file was kept, by whom it was kept and whether accurate or otherwise, were all matters untouched by the evidence.

Volpe has only a vague idea of what occurred in the naturalization case. Under duress he agreed to do whatever Mr. Schlotfeldt desired (R. 22). Apparently he signed some paper as required by Mr. Schlotfeldt. What this was Volpe does not know, no records were produced to show, and Mr. Schlotfeldt did not testify.

Without undertaking to impugn Mr. Schlotfeldt's motives, it is clear that he fell into the error not uncommon among Government agents, of assuming a power even greater than the great power he lawfully possessed. Judge Partridge, (D. C., Calif.), in the case of *In re Linklater*, 3 Fed. (2d) 691, made the following judicious observation:

> "Lastly, the naturalization department makes certain suggestions as to its powers. I do not feel called on to discuss those questions, except to negative the claim that such an examiner is a 'master'. His powers are clearly administrative, and not judicial in any sense. *I am equally clear that such examiners have no power or authority to prevent a man from filing his petition under any circumstances.*" (Italics ours.)

Equally clear also is it that the naturalization agent has neither lawful power nor authority to coerce by threats of criminal prosecution, a man into foregoing his right to consult counsel and to waive the benefits of his judgment of naturalization.

In *Yick Wo* v. *Hopkins*, 118 U. S. 356 6 S. C. 1064, the Supreme Court said:

> "When we consider the theory and nature of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power."

We respectfully submit that the Government has not sustained the burden of proving alienage.

(4) The finding of the making of a false statement by appellant is not sustained by the evidence.

In this connection, we respectfully call attention to the masterly analysis of the evidence by Judge Alschuler, in his dissenting opinion (R. 186-189).

Assuming for the purpose of argument that the false statement intended to be proved was that Volpe was a naturalized citizen of the United States in June, 1928, the proof fails to sustain said charge, because

(a) Phillips does not testify that Volpe said he was a naturalized citizen *in June, 1928* (R. 90, 103).

(b) If Volpe explained that in 1928 he had only first papers there was no false statement. That he made this explanation to Phillips is proved by the testimony of Volpe (R. 27, 55, 110), Serritella (R. 34), and it is indicated by that of Prignano (R. 31) that Volpe made this explanation to the officials in Cuba; also that of Pacelli (R. 37).

(c) Phillips twice evaded the issue when asked what false statements Volpe made to him.

At R. 103 is the following:

"Q. (by Inspector Ellefson): Assuming now that Mr. Volpe was not on June 24, 1928, a citizen of the United States, did he, during the course of your examination of him, make any statement that was false and misleading?

A. I didn't at the time I examined Mr. Volpe, believe that he made any false statements. I was satisfied with all the statements he made."

At p. 110 in this:

"Inspector Ellefson to Mr. Volpe: Do you wish to question Inspector Phillips?

A. Yes, sir.

Mr. Volpe to Inspector Phillips: Q. Mr. Phillips, when I landed at Key West at the Immigration Department, you asked me what my name was, when I was born, my home address, if I was married, if I had any children, if I had my own home,

and you asked me if I was a citizen of the United States, and I said, 'I got my first papers.' You said to me, 'How long you been in the United States?' I says, '23 years' and you said to me, 'were you ever an American citizen, I says to you 'yes, 1920, March 27.' You asked me who naturalized me. I said, 'Judge David, Circuit Court.' Is that right?

A. All that you have said 'Is that right?' Part of what you have said, some I don't remember of ever asking you."

(d) Phillips examined between 18,000 and 30,000 entrants since Volpe and it is beyond human probability that he could remember the details of his conversation with Volpe almost three years before (R. 91-92).

(e) Phillips did not remember Volpe as shown by the fact that Volpe was identified at the hearing by Ellefson for Phillips' benefit, in violation of the rules and practice of the Bureau of Immigration (R. 88-89).

(f) Phillips' memory was very poor because

1. He could not remember Inspector Ellefson's name (R. 108).

2. He could not remember the personal appearance of any one in the Volpe entering party (R. 91-94).

3. He could not remember what he asked Volpe and the others except by reading the manifest (R. 93-95, R. 101).

4. He could not remember whether he swore Volpe and the others or not (R. 118).

5. He could not remember a recent conversation about this matter with his inspector in charge (R. 105).

6. He could not recall the hour of arrival on duty on Sunday, June 24, 1928 (R. 110).

7. He could not remember the present Immigration Rules as to lists of air-men and passengers on aircraft (R. 116-118).

(g) Phillips' testimony is based largely on the "Manifest" Exhibit H (R. 89-112) which is unreliable because

1. Not signed by any one,

2. Not verified by any one,
3. Prepared by an unknown person in a foreign country,
4. Incomplete on its face,
5. If checked at all by Phillips, only partially so,
6. Never shown to Volpe nor its contents divulged to him when entering.

For the above reasons, we respectfully submit that the evidence does not support the finding that appellant entered by means of false and misleading statements.

In the case of *Security Life Ins. Co.* v. *Seeber*, 41 Fed. (2d) 600, the Court of Appeals (7th Cir.) had under consideration the question of the accuracy of testimony of a witness as to a routine matter occurring three years before. The testimony of plaintiff's witness that the payment of an insurance premium was made on a certain date, was believed by the jury and resulted in a verdict for plaintiff. Nevertheless the Court of Appeals considered that the opposing testimony of one witness for defendant with corroborating facts, justified reversal and stated that there should have been a directed verdict for defendant (page 601).

As graphically stated by Judge Alschuler, Mr. Phillips' "incredible feat of memory" did not give substantial evidentiary report to the false statement charge and certainly could not overcome the substantially contradictory evidence of several opposing witnesses.

The rule is well established that testimony even though uncontradicted is not evidence if so improbable or incredible as to be unworthy of belief.

Quock Ting v. *U. S.*, 140 U. S. 417, 11 S. C. 733, 35 L. Ed. 501.

Arkwright v. *Gonser*, 59 Fed. (2d) 702, 706 (9th Cir.).

Easton v. *Brant*, 19 Fed. (2d) 857, 859 (9th Cir.).

Jones v. *Jones*, 35 Fed. (2d) 943, 945 (9th Cir.).
Allen v. *Collins*, 52 Fed. (2d) 708 (8th Cir.).
Larabee Flour Mills v. *Carignano*, 49 Fed. (2d) 151 (10th Cir.).

VI.

The hearing was unfair.

(a) The prosecution refused to produce material witnesses and material documents under its control.

Inspector Phillips testified he recalled the entry of Volpe because a certain Mr. Morgan told him the party had some connection with Capone (R. 103); also that Morgan delivered to Phillips the "manifest" prepared by some unknown person in Cuba (R. 92), also that Morgan delivered an alien manifest for the same trip of this plane (R. 93). Clearly the testimony of Morgan would be very important and appellant was certainly entitled to have his testimony included in the record by the government.

> "The right to cross-examine, even in deportation proceedings, is a constitutional one."
>
> *Gonzales* v. *Zurbrick*, 45 Fed. (2d) 934 (6th Cir.).
> *Whitfield* v. *Hanges*, 225 Fed. 745.
> *Ungar* v. *Seaman*, 4 Fed. (2d) 80.

In *Gonzales* v. *Zurbrick*, 45 Fed. (2d) 934, *supra*, the court held the hearing unfair because a witness was not produced by the prosecution for cross-examination, although no request was made for that privilege by defendant. The court held that it was the duty of the government officials to accord that right, even though not requested, saying, page 937:

> "The interest of truth clearly required that she be offered an opportunity to cross-examine."

So in the present case.

In view of the unverified and informal character of the "manifest" and other "records," the testimony of Inspectors Albury and Cavennes should have been produced as to the condition of these papers when delivered to Phillips, as requested by petitioner's counsel (R. 127-128).

Inspector Phillips, after much questioning by appellant's counsel, finally admitted the existence of an "alien manifest" for this trip of this plane but Inspector Ellefson refused to submit it to counsel's inspection. As this document could easily have been sent to Chicago, the withholding of it by the Bureau justifies the inference that its contents would be unfavorable to the prosecution and inconsistent with Inspector Phillips' testimony.

The rule of law is well settled that the withholding of evidence is strong indication that the evidence if produced would be unfavorable.

U. S. v. *Reyburn*, 6 Pet. 352.
Kirby v. *Tallmadge*, 160 U. S. 379, 383.
Clifton v. *U. S.*, 4 How. 242.
Runkle v. *Burnham*, 153 U. S. 216, 226.

(b) The prosecution introduced irrevelant and prejudicial evidence against petitioner.

At the hearing the prosecution brought into the record many alleged matters prejudicial in nature and immaterial to the deportation charges against appellant. Thus, five or six arrests of Volpe (R. 26), whether he knew Al Capone, the so-called gang leader, and whether he was a member of Capone's so-called gang (R. 30), that one Jacob Guzik accompanied appellant when re-entering the United States in 1928 and that Jacob Guzik was recently (in 1930) sentenced for income tax evasion (R. 30), as to whether he belonged to the Capone gang (R. 51), as to whether he was

in sympathy with gangs (R. 51), that he had been arrested several times (though never convicted) (R. 59).

Probably the finding in effect, that Inspector Phillips testified truly and that Mr. Volpe and his several witnesses who contradicted Mr. Phillips testified otherwise, must be based on this evidence or suggestions and have resulted in a feeling by the Secretary of Labor that appellant and his associates were not worthy of belief.

The fact that the immigration hearings are not subject to the strict laws of evidence, does not alter the unfairness of the hearing in including such matters and excluding appellant's explanation of his conviction for counterfeiting (R. 40, 42).

As the Court of Appeals (1st Cir.) has said in *Mason* v. *Tillinghast*, 27 F. (2d) 580:

> "Department tribunals are not bound by the rules of evidence applicable in a jury trial. But they are bound by the rules of reason and logic—by what is commonly referred to as common sense."

And in *Knock Jan Fat* v. *White*, 253 U. S. 454, the Supreme Court, referring to the great power given the Secretary of Labor over Chinese immigration, said at page 464:

> "It is a power to be administered not arbitrarily and secretly, but fairly and openly, under the restraint of the tradition and principles of free government applicable when the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts to prevent abuse of this extraordinary power."

The rule of law pertinent here is well expressed in *Whitfield* v. *Hanges* (8th Cir.), 222 Fed. 745, 748:

> "An alien, as well as a citizen, is protected by the prohibition of deprivation of life, liberty or property without due process and the equal protection of the law. This principal is universal. It applies to all

persons within the territorial jurisdiction of the United States without regard to any differences of race, or color, or nationality. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, 6 S. Ct. 1064, 30 L. Ed. 220."

CONCLUSION.

In is submitted that for the reasons stated, the writ of certiorari should be granted.

Respectfully submitted,

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